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ARIZONA CORPORATION COMMISSION
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Arizona Corporation Commission
DOCKETED

AUG 16 2013

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Arizona Corporation Commission
Attn: Docket Control
1200 W. Washington St., Room 108
Phoenix, AZ 85007

Re: Reply Comments of Navajo Transitional Energy Company, LLC ("NTEC") to
Letter Inquiry of Arizona Corporation Commission, Docket No. E-00000W-13-
0135 - In The Matter of the Commission's Inquiry into Retail Electric Competition.

Dear Honorable Commissioners:

The Navajo Transitional Energy Company, LLC ("NTEC"), a wholly owned economic enterprise of the Navajo Nation ("Nation"), submits the following reply comments to the initial comments filed in the Arizona Corporation Commission's ("Commission") May 23, 2013 Letter to Stakeholders regarding potential restructuring of the retail electric market in Arizona.¹

Introduction

NTEC has a critical interest in protecting Navajo jobs, in creating additional economic opportunities and growth on the Navajo Nation and in northern Arizona, and in ensuring continued royalty and tax income to the Navajo government from its natural resources. Additionally, NTEC is uniquely poised to aid in transitioning the Nation to cleaner fossil fuel technologies and alternative energy resources that will enhance the Nation's stewardship of its land, air, water, and natural and economic resources, for the benefit of the Navajo people and Arizona citizens alike.

¹ Because allowing the market to set retail electric rates in Arizona has been declared unconstitutional by the Arizona courts, *see Phelps Dodge Corp. v. Arizona Elec. Power Coop.*, 83 P.3d 573, 584-85 (Ariz. Ct. App. 2004), and because any move toward retail competition will require *increased* regulation, bureaucracy, and cost, the Commission's inquiry is best characterized as a "restructuring" of the retail electric market, rather than "deregulation." *See infra.*

As demonstrated by the initial comments of stakeholders advocating for the average residential consumer, *including some of the most vulnerable of Arizona's citizens*, restructuring the retail electric market in Arizona would raise residential electricity and water rates, destabilize the current stable and diverse energy portfolio enjoyed by Arizona consumers, increase regulatory costs for the Commission, and leave Arizona policy making up to the federal government and/or neighboring states, rather than the Commission, all while harming the Arizona and regional economy and crippling the Navajo Nation.² Indeed, the only entities that hypothetically could benefit from restructuring are the large corporate consumers that can leverage their rates on regional and national scales, and merchant plants that will never invest in Arizona's energy future as Arizona's current utility companies are required to do under the careful guidance of this Commission.³ Notably, all of the commenters agree that so-called "competition" in the Arizona retail electric market will require a massive amount of regulation, meaning increased bureaucracy which will inevitably come at a tremendous cost for average Arizona ratepayers.

Moreover, as NTEC and the Nation previously commented, further pursuit of restructuring by the Commission will end a transaction by which NTEC would purchase the Navajo Mine and thus end NTEC's tremendous promise as a *transitional* energy company created for the purpose of investing a significant portion of its profits into research and development of clean and green energy technologies for Arizona's and the Nation's future. Finally, the Commission simply cannot, as a legal or practical matter, meet the goals that are inherent in its constitutional mandate to regulate in the public interest and to set rates for Arizona electrical consumers that are just and reasonable, while concomitantly abdicating that responsibility to policy makers from other jurisdictions and/or the marketplace.

For all these reasons, the Commission should immediately end its inquiry into restructuring the Arizona retail electric market.

² For example, the American Association of Retired Persons ("AARP"), the Arizona Investment Council, and the Arizona Electric Cooperatives, among others, demonstrated that the risks of electric market restructuring greatly exceed any potential benefits, and for most customers would result in instability and increased rates. AARP Comments at 3; Arizona Investment Council at 2; Arizona Electric Power Cooperative Comments at 2-4. Likewise, there will be catastrophic economic impacts to the Nation, the largest Indian tribe in Arizona, from shutting down the Four Corners Power Plant ("FCPP") and the Navajo Generating Station ("NGS") and their associated mines, all of which are inevitable outcomes of any further inquiry by this Commission into restructuring. *See* Navajo Nation Comments at 5-6; NTEC Comments at 3-5.

³ The filed comments that support retail "competition" include the initial comments of Ambit Holding, LLC, Arizona Competitive Power Alliance, Arizona Mining Association, the COMPETE Coalition, Freeport-McMoran Cooper & Gold Inc. and Arizonans for Electric Choice and Competition, Goldwater Institute and Roy Miller, IO Data Centers, LLC, National Energy Marketers Association, Retail Competition Advocates and The Retail Energy Supply Association, and Wal-Mart Stores, Inc. and Sam's West Inc.

I. ANY FURTHER PURSUIT OF RESTRUCTURING OF THE ARIZONA ELECTRIC MARKET WILL CAUSE IMMEDIATE AND SUBSTANTIAL ECONOMIC HARM TO ARIZONA, THE NAVAJO NATION, AND THE REGION, AND END NTEC'S PROMISE AS A TRANSITIONAL ENERGY COMPANY DEDICATED TO THE DEVELOPMENT OF CLEAN AND RENEWABLE ENERGY TECHNOLOGIES.

The Commission should immediately end this inquiry where it has already jeopardized long-term investments in base load energy planning requisite to the needs of Arizona electric consumers. The Navajo Nation is a region with critical energy resources for the entire State of Arizona—traditional and renewable—and is also a major contributor to the Arizona economy. Moreover, as NTEC and the Nation previously commented, this step toward restructuring is yet another regulatory uncertainty coupled with other uncertainties that has the potential to end for decades the Navajo Nation's ability to provide critical government services to its people from royalties it receives from FCPP and NGS, and their associated mines.⁴ As the Speaker of the Navajo Nation Council and the Arizona Speaker of the House noted in their recent joint letter, the inquiry into electric market restructuring by this Commission "has had a chilling effect on resource decision making for long-term investments that directly impact base load energy planning at large scale coal generating stations like Coronado, Cholla, Apache, Navajo and Four Corners."⁵

The harm from the Commission's inquiry is ongoing right now. First, the Commission's inquiry caused APS to hold off from closing a deal where NTEC would purchase Navajo Mine and supply coal from Navajo Mine to FCPP, a critical base load power supplier for Arizona. Without that deal, FCPP and Navajo Mine will shut down, denying the Navajo Nation a unique and significant opportunity to regain autonomy over its natural resources and to take control of its economic destiny. Additionally, and as NTEC noted in its comments, NTEC is mandated by the Navajo Nation Council to reinvest 10% of its net income in clean and renewable energy resources such as solar, wind and coal gasification.⁶ This innovative plan holds tremendous promise for Arizona's energy future, but will be derailed if this inquiry goes any further.⁷

But the harmful effects of this inquiry will not end there. Electric market restructuring will cause the Navajo Generating Station ("NGS") to shut down. The Salt River Project ("SRP"), a majority owner of NGS, has indicated it "will not have the organizational capacity" to continue operating NGS "if we have to deal, yet again, with deregulation."⁸ NGS

⁴ See Navajo Nation Comments at 5-6; NTEC Comments at 3-5.

⁵ Joint Statement of Arizona Speaker of the House Andy Tobin and Speaker of the Navajo Nation Council Johnny Naize Regarding Restructuring of Arizona's Electric Market, July 25, 2013, at 1.

⁶ NTEC Comments at 2.

⁷ Navajo Nation Comments at 2-3; NTEC Comments at 2.

⁸ SRP Comments, Cover Letter from General Manager and Chief Executive Officer Mark Bonsall dated July 15, 2013, at 2.

supplies the power that pumps water for the Central Arizona Project (“CAP”). If NGS and FCPP shut down, Arizona will forever lose coal as a reliable, affordable source of energy to serve its increasing power demand. Replacing coal-fired generation from NGS and FCPP will also cost millions of dollars and result in significant rate increases to Arizona ratepayers. Disastrously, CAP will lose its power supplier, and the price of water for many rural communities and Arizona’s largest metropolitan centers will likely double.

There would be adverse impacts to the communities immediately surrounding the Navajo Nation as well, which would be felt elsewhere in Arizona. According to the Navajo Nation’s Economic Development Report of 2010, 64% of the income earned by members of the Navajo Nation is spent outside the reservation, and thus is an indispensable source of revenue for northeastern Arizona. Electric market restructuring would mean lost revenues and lost income to the small businesses and working families who rely on members of the Navajo Nation to contribute to their local economies.⁹

While the economic impact of the closure of NGS and FCCP on Arizona communities and citizens would be severe, it would be *catastrophic* for the Navajo Nation, where the unemployment rate exceeds 50%.¹⁰ The Navajo Nation relies on NGS and FCPP, and the mines that serve them, not only for some of the highest paying jobs on the Navajo reservation, but for taxes, royalties, and lease and rights-of-way payments that provide most of the Nation’s general operating budget and critical government services for the Navajo community.¹¹

Accordingly, this Commission should immediately end this proceeding. Moreover, given the catastrophic consequences to the Navajo Nation that would result from any further inquiry into restructuring of the Arizona retail electric market, *i.e.*, effectively demolishing the Navajo economy and much of its governmental infrastructure and services, if the Commission holds workshops in this proceeding, at least one should be in Window Rock, Arizona, so that Commissioners can experience firsthand the poverty on the Navajo Nation and understand the disastrous impacts that any further inquiry into restructuring will have on the Navajo Nation and Navajo people.

II. RESTRUCTURING THE ARIZONA RETAIL ELECTRIC MARKET WOULD FOREVER END THE PROVISION OF EXCELLENT ELECTRIC SERVICE AT JUST AND REASONABLE RATES AND SHOULD BE IMMEDIATELY REJECTED BY THE COMMISSION.

Restructuring the retail electric market in Arizona would end Arizona’s long standing record of excellent electric service at “just and reasonable rates.” First, such restructuring

⁹ Other stakeholders have suffered from the regulatory uncertainty of this proceeding. Just after the Commission announced its inquiry, UNS Energy suffered a credit rating downgrade and decreased stock price. *See* Arizona Investment Council’s Comments at 2.

¹⁰ *See* Navajo Nation Comments at 3; NTEC Comments at 2.

¹¹ *See* NTEC Comments at 4-5; Navajo Nation Comments at 3-6.

would jeopardize long-term energy resource plans of incumbent utilities. The incumbent utilities have historically been required by this Commission to put long term investments into Arizona's energy future, including in coal, for the benefit of Arizona consumers. With the current inquiry, until these utilities understand how any restructured market might work, they cannot make such critical long-term power investments. Without these investments, Arizona ratepayers will have no long term plan in place to meet their future power needs, or even to maintain current service quality and pricing regardless of Arizona's projected growth. Arizona's consumers should not be forced to face the unreliability experienced by consumers in other markets as a result of restructuring, such as rolling blackouts.

For the average residential electric consumer, competition and choice in the retail electric market would only lead to those consumers paying higher rates. Residential consumers do not want to shop for electricity, would likely end up with a default electric service provider ("ESP), and which would inevitably lead to higher rates than such consumers are paying now.¹² To make competition even potentially viable for residential ratepayers (*not* legal under the Arizona Constitution for rate setting, *see infra*), this Commission would have to force residential consumers to shop among ESPs, requiring increased bureaucracy and regulation. Moreover, once a residential consumer picked an ESP, that consumer could suddenly be left without *any* provider, as there are no proposed barriers for energy producers to entering and exiting the market—any ESP could just up and leave. Moreover, as several commenters noted, the average residential rate for electricity in Arizona is below the national average.¹³ In contrast, in states with restructured electric markets, like Texas, retail electric prices are consistently higher.¹⁴ Moreover, fixed-income and low-income customers fare particularly poorly under retail electric "competition,"¹⁵ and should not be required by this Commission to bear the burden of the hypothetically lower rates that large scale corporate consumers may be able to leverage in a restructured Arizona marketplace.

Historically, electric market restructuring has been harmful and has not produced reduced rates for all consumers. In California, market restructuring brought "rolling blackouts; wildly escalating, by tenfold, wholesale power prices; the bankruptcy of one California utility; the near bankruptcy of another; and previously unheard-of, significant increases in retail electricity rates. It also fueled the recall of the Governor of California."¹⁶ Similarly, New Jersey currently faces "intractable obstacles in the development of adequate

¹² As the Court recognized in *Phelps Dodge Corp.*, "once the ESP is established in the market, it may increase its rates within the approved range without regard to consumer fairness or a fair return, possibly banking on some consumers' *natural reluctance* to constantly monitor rates, discover abuses, and then switch services." *Phelps Dodge Corp.*, 83 P.3d at 585 (*italics added*).

¹³ *See, e.g.*, Arizona Public Service ("APS") Comments at 5, Table entitled "Average Residential Rates vs. Status of Restructuring."

¹⁴ AARP Comments at 21.

¹⁵ Sierra Club Comments at 1.

¹⁶ Arizona Investment Council Comments at 3.

electric resources to meet the needs of its residents and businesses.”¹⁷ For the second year in a row, customers in Texas are facing potential blackouts on the hottest days of the summer. In Maryland, the General Assembly attempted to dismiss the entire Maryland Public Service Commission because of the huge price increases the followed electric market restructuring.¹⁸ In New York, a study of residential ratepayer electric and gas bills from 2010-2012 revealed that they paid \$500 more for electricity and \$260 more for gas.¹⁹ And in Ohio, data shows customers purchasing natural gas from unregulated suppliers paid over \$861 million since the regulatory commission restructured the gas market.²⁰ Notably, California, Oregon, New Mexico, Nevada, Montana and Virginia suspended or repealed market restructuring laws as to residential and small commercial ratepayers because they were opposed to the resulting market structure and high prices.²¹

Restructuring the Arizona retail electric market would end Arizona’s record of excellent electric service and expose average Arizona electric consumers, including its most economically vulnerable, to *unfair* and *unreasonable* rates, contrary to the Commission’s constitutional mandate, and the Commission should therefore immediately end its inquiry into restructuring Arizona’s retail electric market.

III. BECAUSE OF CONSTITUTIONAL OVERSIGHT REQUIREMENTS OF THE COMMISSION, AND RESULTING BUREACRATIC REQUIREMENTS FOR RESTRUCTURING THE MARKET, ANY SUCH RESTRUCTURING WOULD NOT ACHIEVE THE COMMISSION’S INTENDED GOALS.

Restructuring Arizona’s electrical market into a competitive market is simply unachievable because of the oversight requirements of this Commission under the Arizona Constitution,²² and would only result in increased bureaucracy and associated costs for Arizona consumers, certainly not the goal of this Commission in even inquiring about competition.²³ At a minimum, restructured market advocates estimate that there are three phases of creating competition, the completion of which could take between 2 and 8 years.²⁴ That work includes the divestiture of utilities from their generation, transmission and distribution capacity,²⁵ creation of a Regional Transmission Operator (“RTO”) to balance and

¹⁷ APS Comments at 9.

¹⁸ *Id.* at 6 n. 12.

¹⁹ AARP comments at 7.

²⁰ *Id.* at 8-9.

²¹ *Id.* at 16.

²² *See infra*; NTEC Comments at 7-8.

²³ *See* Letter of Inquiry at 1 (seeking comments on whether retail electric competition is in the public interest).

²⁴ Goldwater Institute Comments at 7 (*cites for Goldwater Institute are based on the pagination of the pdf document in the e-docket*).

²⁵ *Id.* at 95.

schedule load on the electric grid,²⁶ guidelines for a competitive market,²⁷ constant oversight to address inevitable market manipulation,²⁸ and, inevitably, litigation.

It is not in the public interest for the Commission to undertake the following vast amounts of work and expenses, at the average consumer's cost, when Arizona electric bills are stable and lower than the national average:

1. Determine the guidelines for utilities to divest their generation assets;
2. Vertically separate utilities and address utility stranded costs;²⁹
3. Create "a transparent wholesale spot market", which can hardly be done overnight;³⁰
4. Develop "institutions to provide ancillary services";³¹
5. Develop "Financial transmission Rights (FTRs) [which] are created in RTO markets and traded across parties";³²
6. Provide ESPs the right to "enter or exit" the market, which benefits energy providers, *not* customers;³³
7. Develop and monitor a "consumer education program to inform retail customers" about the hundreds of choices they need to find time to make in their busy schedules;³⁴
8. Create "default" prices on procurement by incumbent utilities, which will be spread over fewer customers, causing higher rates;³⁵
9. Develop and oversee municipal aggregation schemes;³⁶
10. Review and approve contracts with utility affiliates;
11. Require and review annual reports from utilities, and conduct audits of affiliate transactions;
12. Restrict guarantees of a utility affiliate's debt or prohibit loans to an affiliate on terms more favorable than commercial terms;

²⁶ *Id.* at 46, 51-52; COMPETE Coalition Comments at 6; Interstate RE Council at 2.

²⁷ Goldwater Comments at 7-8.

²⁸ COMPETE Coalition Comments at 5-7; National Energy Marketers Association Comments at 5; Retail Competition Advocates Comments at 21-22.

²⁹ Goldwater Institute Comments at 8-9.

³⁰ *Id.* at 48.

³¹ *Id.*

³² *Id.* at 49.

³³ *Id.*

³⁴ *Id.* at 54.

³⁵ *Id.*

³⁶ *Id.*

13. Enforce these rules and seek treble damages for payments that benefit a utility affiliate;
14. Require non-discriminatory information sharing between utilities and their affiliates;
15. Monitor and ensure that competitive services from a utility are offered by an affiliate subject to the same conditions as non-affiliate suppliers;³⁷ and,
16. Establish and maintain a database listing suppliers and all their product offerings.³⁸

Additionally, Arizona will have to establish an RTO to balance and schedule the delivery of power, a large, independent, expensive, powerful and unelected institution, and which will require the following minimum efforts of the Commission and State of Arizona to set up:

1. Determine the numerous RTO protocols and structure required to handle massive amounts of power;³⁹
2. Create an independent system operator to oversee and implement RTO operations;
3. Cede authority to the Federal Energy Regulatory Commission ("FERC") to regulate and approve tariffs and resource capacity going forward;
4. Establish a "market monitor" for the RTO to monitor the bidding activity of energy suppliers;⁴⁰
5. Intervene in years of FERC proceedings if ESPs manipulate markets for profitable gains;
6. Require the RTO to initiate a proceeding before FERC to determine appropriate tariffs and capacity market programs;
7. Permit the RTO to determine the sufficient capacity and planning reserve margins for load serving entities;⁴¹
8. Ensure the RTO protocols comply with numerous lengthy FERC Orders; and,
9. Ensure the RTO fulfills transmission planning obligations that the utilities currently conduct.⁴²

Some parties, such as Goldwater Institute, have suggested that Arizona integrate its transmission system with California's Independent System Operator. They provide no details on how this is technically feasible. Moreover, that would make the Arizona transmission

³⁷ COMPETE Coalition Comments at 7-8.

³⁸ Entrust Energy Comments at 3.

³⁹ APS Comments at 13.

⁴⁰ Goldwater Institute Comments at 51-52.

⁴¹ AARP Comments at 19-20.

⁴² Interstate Renewable Energy Council Comments at 2.

system subject to California policies and politics. California's renewable energy procurement policies virtually guarantee that Arizona's electric prices will rise significantly.⁴³

It is no surprise that the cost of all of this will far exceed the uncertain "benefits" of restructuring the market. The Arizona Independent Scheduling Administrator's Association's (AZISA) own estimate (over \$11 million a year for starters) will considerably exceed the Commission's Utilities Division budget and the State's Utility Regulation Revolving Fund.⁴⁴ That estimate does not include the costs for IT systems, IT labor, and IT operations. In addition, the costs will increase to comply with FERC Orders 888, 889, 890 and 100.⁴⁵ Notably, Arizona Public Service ("APS") estimates the cost to transition to restructuring could exceed \$1 billion.⁴⁶ Arizona ratepayers will inevitably have to foot the bill—with no guarantees of affordable, reliable power in the near future.

IV. IF RESTRUCTURING PROCEEDS, FERC WOULD ASSUME MUCH OF THE COMMISSION'S CURRENT POLICY MAKING FUNCTIONS.

Electric market restructuring would also shift jurisdiction for many aspects now under the Commission's jurisdiction to FERC.⁴⁷ As a result of this Commission's efforts, Arizona consumers enjoy safe and reliable electric service and rates below the national average. But if the Commission pursues electric market restructuring, its role in energy policy, and its ability to protect the interests of Arizona, would be significantly ceded to FERC, including jurisdiction over generation. Indeed, "[s]tate commissions in restructured states have effectively been transformed from the decision-maker in state proceedings to one of several intervenors in FERC proceedings."⁴⁸ The experience of other states that have gone through electric market restructuring demonstrates the difficulty the Commission would have in effectively representing the interests of Arizona in such a situation. California's commission, for instance, is still fighting these battles.⁴⁹

Private, out-of-state energy providers—the "merchant providers"—will make short-term, market-driven decisions, instead of planning for the long-term resource needs of Arizona like the incumbent utilities have been required to do by the Commission. *And, the Commission will have no authority to regulate them or ensure that there is adequate long-term investment necessary to protect Arizona consumers.* Restructured markets have led to capacity shortages, including in Texas, and an overreliance on the volatile prices of natural

⁴³ AARP Comments at 5.

⁴⁴ AZISA Comments at 5.

⁴⁵ *Id.* at 3.

⁴⁶ APS Comments at 3.

⁴⁷ Tucson Electric Comments at 3.

⁴⁸ APS Comments at 8.

⁴⁹ See, e.g., The Associated Press, *California consumers could see \$1.6 billion in refunds from energy crisis in 2000* (February 19, 2013), available at http://www.oregonlive.com/business/index.ssf/2013/02/california_consumers_could_see.html (as of July 10, 2013).

gas. This Commission has ensured that the utilities in Arizona make long-term investments in Arizona resources, including in Arizona's stable and substantial coal reserves. In a restructured market, consumers lose that protection and are subject to the free-handed regulations of FERC or an RTO,⁵⁰ and the volatile prices of electricity from natural gas base load generation facilities instead of coal-fired plants like FCPP and NGS.

Indeed, restructuring of the electric market in Arizona would effectively be a relinquishment of state rights, where the constitutionally designated state policy makers, *this Commission*, would no longer control Arizona's energy future. This Commission should not abdicate its critical responsibility to Arizona consumers and should immediately end this inquiry.

V. LEAVING RATE SETTING TO THE MARKETPLACE IS UNCONSTITUTIONAL AND RESTRUCTURING WOULD THEREFORE BE IMPRACTICAL.

Contrary to assertions made by some advocates for competition, *Phelps Dodge Corp.* is still good law and was *not* overruled by *Miller v. Arizona Corp. Com'n*, 251 P.3d 400 (Ct. App. 2011).⁵¹ Nor can *Phelps Dodge Corp.* be reconciled with rate setting by the marketplace if there is a "range of rates."⁵² On the contrary, simply because the Commission has broad ratemaking authority, it nonetheless *cannot* violate the plain language of the Arizona Constitution,⁵³ and the Court in *Phelps Dodge Corp.* specifically rejected the contention that the Commission's "approval of a broad range of rates within which the competitive marketplace can operate satisfies the Commission's obligation to set just and reasonable rates"⁵⁴

Notably, none of the advocates for competition have proposed a rule for rate setting by the marketplace, or shown how such a rule would be constitutional. Attempting to revamp rate setting by the marketplace through rule of this Commission will simply spur needless and protracted litigation where the Arizona Constitution is plain on its face and pursuant to *Phelps Dodge Corp.* this Commission cannot abdicate its critical responsibility to ensure that the best interests of *all* stakeholders are considered in rate setting.⁵⁵

CONCLUSION

For the above reasons, and to insure that the best interests of the vast majority of

⁵⁰ Tucson Electric Comments at 3.

⁵¹ See *id.* at 406-07 (citing to *Phelps Dodge*, not overruling it); see, e.g., Goldwater Institute Comments at 14.

⁵² See Freeport-McMoran Comments at 17.

⁵³ See *Phelps Dodge Corp.*, 83 P.3d at 585-86.

⁵⁴ See *id.*; see NTEC Comments at 7-8.

⁵⁵ See *Phelps Dodge Corp.*, 83 P.3d at 584-85; see NTEC Comments at 7.

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Arizona ratepayers and citizens are met, including the most vulnerable consumers, the Commission should immediately end this inquiry and not further pursue restructuring of the retail electric market in Arizona.

Respectfully,

FRYE LAW FIRM, PC

A handwritten signature in black ink, appearing to read 'W. Kelly', with a long horizontal flourish extending to the right.

William Gregory Kelly

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Company, LLC*

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served on all parties of record by placing the same in the United States mail, postage prepaid and addressed as follows, on the 16th day of August, 2013:

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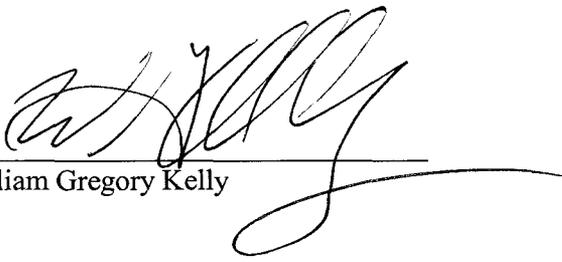
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